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GOVERNMENT OF STATE OF SARAWAK v. DATO' SRI WONG SOON KOH

HIGH COURT SABAH & SARAWAK, SIBU
CHRISTOPHER CHIN SOO YIN JC
[CASE NO: SBW-21NCVC-3-6-2020]
13 APRIL 2021

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CIVIL PROCEDURE: *Subpoena – Setting aside – Application for – Application to set aside subpoena to testify and produce documents – Whether applicant compelled to testify and produce documents – Whether applicant had personal knowledge – Whether evidence were 'affairs of State', privileged from disclosure under ss. 123 & 162 of Evidence Act 1950 – Whether evidence sought related to 'affairs of State' – Whether dispute ought to be resolved in accordance with rules of politics or rules of court – Rules of Court 2012, O. 92 r. 4*

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The plaintiff was the State Government of Sarawak while the defendant was the President of an opposition political party. Pursuant to an amicable settlement entered into between the plaintiff and Petroliam Nasional Bhd ('Petronas'), that Petronas were allowed to pay only RM2 billion out of RM3.8 billion of state sales tax ('SST') it owed to the plaintiff ('discount'), the defendant published several statements *via* Facebook suggesting that there

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was a deal struck behind closed doors between the plaintiff and Petronas ('statements'). This, according to the plaintiff, was defamatory. Hence, the plaintiff commenced a suit for defamation against the defendant. In preparation for trial, the defendant served a subpoena on the Chairman of Petronas ('Chairman') to give evidence and produce documents relating to

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the negotiations between the plaintiff and Petronas leading to the entering of the amicable settlement on behalf of the defendant ('subpoena'). In resisting the subpoena, the plaintiff and the Chairman both filed notices of applications under encls. 79 and 92 respectively, for an order of the court to set aside the subpoena pursuant to the court's inherent jurisdiction under

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O. 92 r. 4 of the Rules of Court 2012. Both applications under encls. 79 and 92 relied on the grounds, *inter alia*, that: (i) the Chairman was not involved in the negotiations between the plaintiff and Petronas, hence, he had no personal knowledge of the same and every information regarding the amicable settlement from the Chairman would be hearsay as it had been

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communicated and/or forwarded to him; and (ii) the evidence sought by the defendant was related to 'affairs of State', therefore, privileged under ss. 123 and 162 of the Evidence Act 1950 ('EA') from disclosure. Thus, the issue faced by the court was whether the evidence in possession of the Chairman sought by the defendant was privileged from disclosure, in turn, warranting the subpoena to be set aside.

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Held (dismissing encls. 79 and 92):

(1) There was no evidence that an explanation had been proffered to the defendant regarding the alleged discount given to Petronas. In fact, the plaintiff even sought to prevent the disclosure of the relevant evidence to court by relying on ss. 123 and 162 of the EA. The said sections must be looked from the perspective that only the plaintiff themselves could authorise the disclosure of the privileged information or documents in possession of the Chairman, which they ought to do if they wished to prove their case against the defendant. The plaintiff is the State and not a third party that was being dragged into a dispute seeking for disclosure of State documents or information. Therefore, the argument about 'public interests' versus 'affairs of State' or 'without prejudice' had become an exercise in semantics. This was a political dispute that should be resolved in accordance with the vagaries of the rules of politics and not by the rules of court which demand a proof by clear evidence adduced to satisfy the burden of proof placed on the asserter. (paras 20-24)

(2) The mock cheque exchanged for the amicable settlement was for RM2.89 billion, an amount not small by any measure. Even if the Chairman was not involved in the negotiations, the final decision to pay must have been voted by the Board of Directors chaired by him, at the very least, after deliberation of a board paper outlining the quantum and rationale of the payment to the plaintiff. Suggesting the Chairman was unaware of this would mean that Petronas did not practice the most basic corporate governance precepts, which begged belief. Moreover, a resolution passed by a Board of Directors of Petronas was not hearsay to its Chairman. It was thus difficult to accept the assertion that the Chairman had no personal knowledge regarding the negotiations leading to the amicable settlement. The subpoena served on the Chairman therefore, was not oppressive, frivolous, vexatious or an abuse of court process. The applications under encls. 79 and 92 were thus dismissed with no order as to costs. (paras 31 & 33-37)

Case(s) referred to:
BA Rao & Ors v. Sapuran Kaur & Anor [1978] 1 LNS 14 FC ***(refd)***
ECM Libra Investment Bank Bhd v. Foo Ai Meng & Ors [2013] 1 LNS 99 CA ***(refd)***
Ismail v. Hasnul & Another Appeal [1967] 1 LNS 60 FC ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 114(g), 123, 162
Rules of Court 2012, O. 38 r. 14, O. 92 r. 4

A *For the plaintiff - Mohd Adzrul Adzlan, Oliver Chua Yaw Kwang & Khairul Kabir Abdul Kadir; SLO Sarawak*
For the defendant - George Lo & Clement Wong; M/s Clement And Company Advocs
For the applicant (Petronas) - George Lim & Christine Lim; M/s Battenberg & Talma Advocs

B *Reported by Syamim Ariffin*

JUDGMENT
(encls. 79 & 92)

Christopher Chin Soo Yin JC:

C **Background**

[1] The defendant is a multiple term member of the Dewan Undangan Negeri, Sarawak ("DUN") and had served in numerous ministerial positions in the State Government but is at present, effectively in opposition to the plaintiff.

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[2] The defendant is the president of a political party known as Parti Sarawak Bersatu ("PSB") which is in opposition to the Sarawak State Government/plaintiff in this case.

[3] The plaintiff had in 2019 taken action against Petroliam Nasional
E Berhad ("Petronas") in respect of State sales tax ("SST") owed to the plaintiff by Petronas. There were several actions filed with the Kuching High Court. Except for a judicial review which was ruled in favour of the plaintiff, the remaining suits (and their appeals) were discontinued following an amicable settlement being entered into between the plaintiff and Petronas as evidenced
F by the issuance of a joint statement dated 8 May 2020 ("joint statement") by the plaintiff and Petronas.

[4] The plaintiff commenced a suit against the defendant alleging defamation published *via* a Facebook post by the defendant in his capacity as President of PSB, published apparently on 9 May 2020. The alleged
G offending statements were:

(a) … the Sarawak Government owes an explanation to the DUN and the people of Sarawak why Petronas was allowed to pay only RM2 billion when it owed RM3.8 billion. Why the massive discount?

(b) more importantly, what deal was struck behind closed doors
H between the GPS Government and Petronas for Sarawak to give up its petroleum rights in exchange for a meagre payment of RM2 billion which Petronas was already obligated to pay under the Court order? Sarawak received nothing in exchange for the waiver of our petroleum rights.

I (c) ... I have posed this question which must be in the minds of all Sarawakians: Is the GPS government now silent because its MPs are in the cabinet of the Federal Government.

[5] In preparation for trial, the defendant subpoenaed Tan Sri Ahmad Nizam Salleh, the Chairman of Petronas ("the Chairman") to give evidence and produce documents on behalf of the defendant.

Enclosure 79

[6] The plaintiff then files a notice of application under encl. 79 seeking that this court sets aside the subpoena to testify by the Chairman, through the inherent jurisdiction of the court as well as under O. 92 r. 4 of the Rules of Court 2012 ("ROC").

[7] The grounds of the application included:

(i) The Chairman has no personal knowledge of any facts leading to the defamation suit nor of the negotiations and discussions leading to the joint statement dated 8 May 2020;

(ii) The evidence sought by the defendant relates to negotiations leading to settlements of disputes is as a matter of policy to promote out of court settlement, privilege from disclosure and are inadmissible;

(iii) That the subpoena to testify and produce documents had failed to identify or specify the documentary evidence sought and is an attempt to fish for evidence;

(iv) That the evidence sought by the defendant relates to "affairs of State" of Sarawak and is therefore privileged under s. 123 and s. 162 of the Evidence Act 1950;

Enclosure 92

[8] This is the notice of application by the applicant, the Chairman, through the plaintiff seeking in essence:

[9] That the subpoena to testify and produce documents issued to the Chairman dated 25 February 2021 (encl. 67) on the application of the defendant to give evidence and to produce documents kept in the possession of Petronas in this action be set aside pursuant to the inherent jurisdiction of the Honourable Court under O. 92 r. 4 of the ROC.

[10] On the grounds that:

(i) the evidence sought by the defendant, if available, relates to negotiation and discussions leading to the settlement in dispute between Petronas and the plaintiff and is privileged from disclosure and inadmissible;

(ii) except for the joint statement, the Chairman does not have any personal knowledge of the facts of the matters related to this action nor of any facts pertaining to or leading up to the issuance of the joint statement;

(iii) the evidence, if any, relates to the "affairs of the State" of Sarawak and is privileged under s. 123 of the Evidence Act;

(iv) the subpoena failed to identify or specify the documents and was requested for on the improper motive to "fish for evidence";

(v) the subpoena is oppressive in nature and an abuse of the process of the court.

Ruling On 13 April 2021

[11] On 13 April 2021, I dismissed encls. 79 and 92 with no order as to costs after giving parties, including counsel for Petronas/the Chairman every opportunity to address the court. Counsels also expressed that they had no objection to me hearing this matter despite my disclosure of my earlier involvement in the onset of the legal disputes between the plaintiff and Petronas when I was then sitting in Kuching High Court 2. I ruled:

> Firstly, I have in an earlier proceeding disclosed to parties that I was involved marginally in hearing the earlier dispute between the Sarawak Government and Petronas and the Suits which I was to hear have been withdrawn and discontinued. I therefore take it the parties have no objection to me hearing this case;
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> Secondly, having heard the oral submissions by parties today, it become apparent to me that the dispute is a very narrow one and is likely a political dispute.
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> Thirdly, I agree with the counsel for the defence and that I find it difficult to accept that the chairman of a company has no knowledge of the events leading to the payment out of RM2B from the company of which he is the chairman.
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> Fourthly, as I earlier said that this seem to me to be a political dispute but when such dispute is brought to this Court, the parties are bound by the rules of Court and all the procedures which go with it.
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> Fifthly, for the above and other reasons, I am satisfied that the Defendant should be entitled to call the chairman of Petronas as their witness and let this Court decide what is or isn't admissible.
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> Sixthly, I therefore dismissed enclosures 79 and 92 and I make no order as to costs.
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> Seventhly, the trial has been fixed for the 26 - 30.7.2021 and these trial dates are affirmed so that parties can arrange the witnesses coming to Sarawak to undergo the mandatory 14 days quarantine in Sibu before appearing in Court.
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> Eighthly, there is an application by letter that the proceedings be heard by zoom. However, I accept the argument by SAG [the Plaintiff] in enclosure 75 that witnesses other than administrative witnesses must appear in Court in person to give evidence. I leave it to counsels to decide

which witness can give evidence by zoom or to appear in person. If agreement cannot be reached on any particular one witness, such witness must appear in person.

[12] In addition to my ruling on 13 April 2021, my reasons for dismissing on encls. 79 and 92 follows.

Arguments By The Plaintiff

[13] The plaintiff's encl. 79 was supported by the affidavit in support (encl. 80) affirmed by Sharifah Hasidah bt Sayeed Aman Ghazali an elected member of the DUN and an Assistant Minister in the plaintiff whose averments mirror the grounds in encl. 79 above.

The Law On Subpoenas In Brief

[14] The subpoena is issued upon an application under O. 38 r. 14:

> 14 (1) A subpoena shall be in the Forms 63, 64 and 65, whichever is appropriate.
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> (2) The issue of the subpoena takes place upon it being sealed by an officer of the registry.
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> (4) The Registrar may, in any case, revoke a subpoena upon a application by any person or on his own motion.
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> (5) Any party who is dissatisfied with any decision of the registrar made under this rule may apply to a Judge for a review of that decision.
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> (6) An application under this rule shall be made by a notice of application supported by an affidavit, within fourteen days of that decision.

[15] In the Federal Court case of *Ismail v. Hasnul* [1967] 1 LNS 60; [1968] 1 MLJ 1081, Azlan Shah J (as then was) has this to say at pp. 110 to 111 (MLJ):

> The practice in all courts has been that a subpoena may be issued against anybody, be he a Minister of the Government or a nonentity. It cannot be gainsaid that a Minister has any more privilege than that enjoyed by a member of the public. Injustice will arise if equals are treated unequally. But the court possesses inherent jurisdiction to see that this privilege is properly exercised and in a proper case can restrain its abuse: see *Raymond Tapson* (1882).

[16] In *ECM Libra Investment Bank Bhd v. Foo Ai Meng & Ors* [2013] 1 LNS 99; [2013] 3 MLJ 35 the Court of Appeal held that (emphasis added):

> (c) the law in respect of setting aside of subpoena is well settled. *Any witness who has seen the facts or who knows the facts can be compelled to assist the court and should assist the court by giving evidence unless the exception applies.* In *Harmony Shipping Co SA v. Davis and Others* [1979] 3 All ER 177, the English Court of Appeal asserted that, aside from issues of oppression, the subpoena must be obeyed. The court stated:

A That principle is established in the case of a witness of fact: for the plain, simple reason that the primary duty of the court is to ascertain the truth by the best evidence available. Any witness who has seen the facts or who knows the facts can be compelled to assist the court by giving that evidence ...

B In this particular case Mr Davis has been subpoenaed by the defendants. It seems to me that that is very right and proper. It was suggested that the subpoena should be set aside. As far as I know, no subpoena *ad testificandum* has ever been set aside except at the instance of the witness C himself when he has claimed that it would be oppressive to make him answer that subpoena. Otherwise a subpoena *ad testificandum* must be obeyed by the witness. He must come to the court and be ready to give his evidence and answer such questions as the judge permits to be answered.

D We must say here that the above case and many other cases in this area of jurisprudence cannot be taken as the authority to compel persons who have no nexus to the case or where their evidence will not be relevant or admissible to give evidence readily for the purpose of assisting the litigants (as opposed to assisting the court to arrive at the truth) that too to arrive at the quantum. The test E to compel is a strict test. The witnesses who can be compelled are those 'who have seen the facts or who know the facts' and this will usually relate to liability and rarely to quantum. Such strictures may not be applicable if the witness voluntarily gives evidence on the issue of liability or quantum;

F (d) *in the Malaysian context a litigant under the rules of court has a right to issue a subpoena and sustain the same provided it is not oppressive or an abuse of process of court and is relevant and material to the case and is not frivolous or scandalous* (see *Ong Jane Rebecca v. Lim Lie Hoa and others (Lim Lie Hoa, third party)* [2003] 1 SLR 457).

G **Sections 123 And 162 Of The Evidence Act 1950**

[17] The plaintiff relies on ss. 123 and 162 of the Evidence Act to resist and set aside the subpoena:

123. No one shall be permitted to produce any unpublished official records relating to affairs of State, or to give any evidence derived therefrom, H except with the permission of the officer at the head of the department concerned, who shall give or withhold permission as he thinks fit, subject, however, to the control of a Minister in the case of a department of the Government of Malaysia, and of the Chief Minister in the case of a department of a State Government.

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162(1) A witness summoned to produce a document shall, if it is in his possession or power, bring it to court notwithstanding any objection which there may be to its production or to its admissibility. The validity of any such objection shall be decided by the court.

(2) The court, it sees fit, may inspect the document unless it refers to affairs of State, or take other evidence to enable it to determine on its admissibility.

(3) If for such purpose it is necessary to cause any document to be translated, the court may, if it thinks fit, direct the translator to keep the contents secret unless the document is to be given in evidence, and if the translator disobeys the direction, he shall be held to have committed an offence under section 166 of the Penal Code.

[18] Raja Azlan Shah FJ (as he then was) in *B.A. Rao & Ors v. Sapuran Kaur & Anor* [1978] 1 LNS 14 held that (emphasis added):

In the *State of Uttar Pradesh v. Raj Narain* AIR 1975 C 865 the Supreme Court took the following stand:

> The foundation of the law behind sections 123 and 162 of the Evidence Act is the same as in English law. It is that injury to public interest is the reason for the exclusion from disclosure of documents whose contents if disclosed would injure public and national interest. Public interest which demands that evidence be withheld is to be weighed against the public interest in the administration of justice that courts should have the fullest possible access to all relevant materials. When public interest outweighs the latter, the evidence cannot be admitted. The court will *proprio motu* exclude evidence the production of which is contrary to public interest. It is in public interest that confidentiality shall be safeguarded. The reason is that such documents become subject to privilege by reason of their contents. Confidentiality is not a head of privilege. It is a consideration to bear in mind. It is not that the contents contain material which it would be damaging to national interest to divulge but rather that the documents would be of class which demand protection. To illustrate the class of documents would embrace Cabinet papers, Foreign Office dispatches, papers regarding the security of the State and high level inter-departmental minutes. In the ultimate analysis the contents of the documents are so described that it could be seen at once that in the public interest the documents are to be withheld.
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> The high-water mark of *Raj Narain*'s, *supra*, case is the clear acceptance of the principle by the court that affidavit evidence claiming privilege is not conclusive and the court has power to inspect the document to satisfy itself that it requires protection. Secondly, a claim to privilege cannot be rejected merely on the ground that no affidavit was filed or that it was defective. Where no affidavit was filed, an affidavit could be filed later; if an affidavit

was defective, an opportunity could be directed to file a better affidavit. In any case, the question of privilege is one for judicial resolution.

In this country, objection as to production as well as admissibility contemplated in sections 123 and 162 of the Evidence Act is decided by the court in an enquiry of all available evidence. This is because the court understands better than all others the process of balancing competing considerations. It has power to call for the documents, examine them, and determine for itself the validity of the claim. Unless the court is satisfied that there exists a valid basis for assertion of the privilege, the evidence must be produced. This strikes a legitimate balance between the public and private interest. Where there is a danger that disclosure will divulge, say, State secrets in military and international affairs or Cabinet documents, or departmental policy documents, private interest must give way. It is for the court, not the executive, ultimately to determine that there is a real basis for the claim that "affairs of State is involved", before it permits non-disclosure. While it is clear that the final decision in all circumstances rests with the court, and that the court is entitled to look at the evidence before reaching a concluded view, it can be expected that categories of information will develop from time to time. It is for that reason that the legislature has refrained from defining "affairs of State". In my opinion, "affairs of State", like an elephant, is perhaps easier to recognise than to define, and their existence must depend on the particular facts of each case ...

A mere assertion of confidentiality and that affairs of State are involved without evidence in support cannot, in my view, shut out the evidence sought by the respondents ...

I may also point out that confidentiality is not a separate head of privilege, but may be a material consideration to bear in mind in determining whether the public interest falls on the side of disclosure or non-disclosure. "The fact that information has been communicated by one person to another in confidence is not a sufficient ground for protecting from disclosure in a court of law the nature of the information if it would assist the court to ascertain facts which are relevant to an issue on which it is adjudicating." (See *D v. National Society for the Prevention of Cruelty to Children* [1977] 1 AER589). The need to preserve freedom and candour of communication with and within the public service has been a favourite argument but once this unsound argument is allowed to run riot, free rein would be given to the tendency to secrecy which is inherent in the public service. Freedom and candour of communication is not a factor in itself that will persuade the court to order that information be not disclosed, and that line of argument was scorned by the House of Lords in *Conway v. Rimmer, supra.* The approach taken was that the number of instances of revelation in judicial proceedings is infinitesimal when compared with the number of occasions on which it is necessary for public

servants to express their views. Further, it would be belittling them to suggest that their advice would vary according to whether or not it was exposed to public scrutiny. I do not think public servants would shrink from giving honest opinions just because there is a distant chance that their report may one day have to be disclosed in open court. As Lord Radcliffe said in *Glasgow Corporation v. Central Land Board* [1956] SC1: "I should myself have supposed Crown servants to be made of sterner staff", and he criticised the insidious tendency to suppress everything however commonplace that has passed between one civil servant and another behind the departmental screen.

The documents of the said Committee of Enquiry consist of a report dated October 3, 1973 compiled by the said Committee and notes of evidence. These departmental documents are not unpublished documents relating to affairs of State. Consequently where the Government or the doctor is sued for negligence the Government cannot screen the alleged wrongful act from the purview of the court on the ground that it is an affair of State demanding protection. *In the administration of justice nothing is of higher importance than that all relevant evidence should be admissible and should be heard by the tribunal that is charged with deciding according to the truth. To ordain that a court should decide upon the relevant facts and at the same time that it should not hear some of those relevant facts from the person who best knows them and can prove them at first hand, seems to be a contradiction in terms. It is best that truth should be out and that truth should prevail.*

Consideration Of Sections 123 And 162

[19] When I ruled on 13 April 2021, I said, and I quote:

Fourthly, as I earlier said that this seem to me to be a political dispute but when such dispute is brought to this Court, the parties are bound by the rules of Court and all the procedures which go with it.

[20] The State Government of Sarawak was posed with questions by the defendant. They construed these statements as defamatory which did not merit response since there is no evidence that they have proffered an explanation to the defendant as to the alleged discount given to Petronas. They are alleging that the defendant defamed them by doing a deal with Petronas "behind closed doors". The alleged defamatory words:

(d) more importantly, what deal was struck behind closed doors between the GPS Government and Petronas for Sarawak to give up its petroleum rights in exchange for a meagre payment of RM2 billion which Petronas was already obligated to pay under the Court order? Sarawak received nothing in exchange for the waiver of our petroleum rights.

[21] Yet the plaintiff now seeks to prevent disclosure to court by relying on ss. 123 and 162 of the Evidence Act and is so doing risking the possibility of this court inferring that there was indeed a deal "behind closed doors". (see s. 114(g) of the Evidence Act 1950).

[22] Further ss. 123 and 162 in this case must be looked from the perspective that the plaintiff themselves can authorise the disclosure of the confidential or privileged information by Chairman of Petronas which they need to do so if they want to prove their case against the defendant. The State Government of Sarawak is not a third party being dragged by parties to a dispute seeking to disclose State documents or information. The State is the plaintiff.

[23] With this reasoning, and in this case, the argument about "public interests" versus "affairs of State" or "without prejudice documents" becomes an exercise in semantics.

[24] For this reason, I ruled on 13 April 2021 that this is a political dispute. Such disputes should be resolved in accordance with the vagaries of the rules of politics and not by the Rules of Court which demand proof by clear evidence adduced to satisfy the burden of proof placed on the asserter.

[25] Put simply, a plaintiff cannot come to court and assert that, "the defendant has wronged me but I cannot tell you why because it is a secret, but I nevertheless want redress".

The Grounds/Affidavit In Support For Enclosures 79 And 92 By The Plaintiff And The Applicant Respectively

[26] On 13 April 2021, I also ruled that:

> Thirdly, I agree with the counsel for the defence and that I find it difficult to accept that the chairman of a company has no knowledge of the events leading to the payment out of RM2B from the company of which he is the chairman.

[27] My reasons for saying this follows.

[28] The applicant, the Chairman of Petronas was appointed into the Board of Petronas on 1 August 2018 which is before the series of suits between the plaintiff and Petronas commenced at the Kuching High Court.

[29] The expressed grounds for encl. 79 (application by the plaintiff to set aside the subpoena issued for the Chairman) stated:

> (a) that the Witness (the Chairman of Petronas) has no personal knowledge of any facts relating to the present suit nor to the negotiations and discussions leading to the Joint Statement on the 08.05.2020.

[30] Enclosure 92 (by the applicant/Chairman to set aside the subpoena against him) was supported by his affidavit in support (encl. 93). In his affidavit, the Chairman repeated the contents of and supported the letter written by Petronas to counsel of the defendant on 8 March 2021 which stated, among other things:

> 3. … we wish to state that PETRONAS Chairman was not involved personally in any of the negotiations and discussion, thus he has no personal knowledge whatsoever for the Joint Statement. All other information would be "hearsay" as it was have been communicated and/or forwarded to him.

[31] The mock cheque exchanged on 8 May 2020 during the joint statement was for RM2.89 billion. Bearing in mind that such an amount is no small change by any measure, even if the Chairman was not involved in the negotiations, the final decision to pay must be voted on by the Board of Directors chaired by him and at the very least, after deliberation of a Board paper outlining the quantum and the rationale of the payment to the plaintiff.

[32] The Board paper would also need to deliberate the discontinuance of the legal suits, the potential liability to Petronas for the SST in the future and perhaps the likelihood of such settlement attracting like liability with other oil-producing States in Malaysia.

[33] To suggest that all these were not considered and that the Chairman is not aware of this would suggest Petronas does not practice the most basic of corporate governance precepts, which begs belief.

[34] A resolution passed by the Board of Directors of Petronas is not hearsay to the Chairman of that Board, as was suggested by the plaintiff and applicant.

[35] For the above reasons, I find it difficult to accept the assertion that the Chairman has "no personal knowledge whatsoever for the joint statement".

Conclusion

[36] In the premises, I am satisfied that the subpoena served on the Chairman by the defendant is not oppressive on him, neither is it frivolous, vexatious nor constitute an abuse of court process. As Petronas was a party to the joint statement, the Chairman's evidence would be material to this suit. But whether such evidence he adduces will help the plaintiff, the defendant or neither of them is for this court to decide.

[37] I order as I did on 13 April 2021:

> Sixthly, I therefore dismissed enclosures 79 and 92 and I make no order as to costs.